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Involuntary Competence in United States Criminal Law

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1. Introduction

This chapter addresses whether in the United States the state has the right to forcibly medicate an incompetent defendant or prisoner to restore competence, including competence to stand trial, competence to plead guilty and to waive trial rights, competence to represent himself, and competence to be sentenced.[1] Other legal systems may treat this as primarily a mental health law question addressed best by mental health laws, but in the United States, it is a criminal law question although some courts are very deferential to the judgment of mental health professionals.

The chapter first presents the legal and mental health background concerning incompetence and the right of prisoners generally to refuse psychotropic medication. Although the relevant cases are important and deserve sustained analysis in their own right, for the purposes of this chapter, they are presented only as the basis for addressing the article's central question. The next part turns specifically to the claim that the state does have the right forcibly to treat, primarily to medicate with psychotropic substances, solely to restore various competencies. The general thesis is that in appropriate cases, finality in the criminal process is such an important value that the state should have the power to forcibly medicate an incompetent defendant or prisoner who refuses medication.

2. Legal and Mental Health Background

This section of the chapter addresses various competencies, the permissibility of involuntary medication generally, some general procedural issues concerning incompetence, and concludes with information about the mental health and treatment issues.

Criminal Competencies

Other chapters explore the competence doctrines themselves, so I shall only provide sufficient information to motivate the main question of

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[1] Forcible medication to restore competence to be executed is an issue in the United States, but since volume will be read by many people who live in countries that do not impose capital punishment, the editors have asked me to omit discussion of this issue to conform to the volume's word limits. I have discussed the issue in Stephen Morse, 'Mental Disorder and Criminal Law' (2011) 101 Journal of Criminal Law and Criminology 895.

involuntary treatment. I will not explore in any depth the theoretical bases for these doctrines, which have been ably addressed by Bonnie, Saks, and Schopp.[2] In the succeeding sections of the chapter, I shall assume that a defendant has properly been found incompetent according to the applicable standard in the jurisdiction and will not address the wisdom of various different competence tests.

In three important cases, *Dusky v. United States*, *Pate v. Robinson*, and *Drope v. Missouri*,[3] the United States Supreme Court created the federal constitutional doctrine governing incompetence to stand criminal trial. The first, a brief *per curiam* opinion, involved a statutory interpretation of the then applicable incompetence to stand trial provision of the federal code. The Court held that it was not sufficient to find competence simply because "the defendant [is] oriented to time and place and [has] some recollection of events." Rather, the test was

> Whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.[4]

Although the case did not impose this standard on the states as an invariant constitutional requirement, the standard it adopted for federal criminal cases has been very influential with legislatures and courts that have addressed the Issue. The current federal standard is similar. A defendant will be found mentally incompetent to stand trial if the defendant,

> is presently [sic] suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense

[2] Richard J. Bonnie, 'The Competence of Criminal Defendants: A Theoretical Reformulation' (1992) 10 Behavioral Sciences and the Law 291; Richard J. Bonnie, 'The Competence of Criminal Defendants: Beyond Dusky and Drope' (1993) 47 University of Miami Law Review 539; Elyn R. Saks, *Refusing Care: Treatment and the Rights of the Mentally Ill* (University of Chicago 2002); Robert F. Schopp, 'Involuntary Treatment and Competence to Proceed in the Criminal Process: Capital and Noncapital Cases' (2006) 24 Behavioral Sciences and the Law 495.

[3] *Dusky v United States* 36 US 402 (1960); *Pate v Robinson* 383 US 375 (1966*); Drope v Missouri* 420 US 162 (1974).

[4] *Dusky v United States* 36 US 402, 402.

Pate held that the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent violated the due process right to a fair trial, thus cementing the constitutional status of the prohibition against trying an incompetent defendant. The Court also observed that it was contradictory to claim that an incompetent defendant could waive the right to have his competence determined. *Drope* noted that the prohibition against trying incompetent defendants is fundamental to an adversary process. The Court held that due process requires that, at any time during criminal proceedings that a defendant's competence seems to be in question, further inquiry is required. The Court wrote that "There are ... no fixed or immutable signs which invariably indicate the need for further inquiry ... ",[5] and that deciding to do so was often a difficult inquiry, calling for the exercise of judgment.

The rationale for the constitutional doctrine, which is rooted in the Fifth, Sixth, and Fourteenth Amendments, appears straightforward: A defendant cannot receive a fair trial if he or she is incompetent. After all, if a defendant does not understand what is happening or cannot assist counsel, the defendant's ability to help guide his or her own defense will be substantially impaired because the defendant will not be able rationally to make crucial decisions, such as whether to testify in his own defense or to raise various claims, and he will not be able to assist counsel to defeat the prosecution's case. Accuracy and autonomy interests are therefore compromised. Moreover, it undermines the dignity of the criminal trial process to try an incompetent defendant. Although these are undoubtedly weighty concerns, there is reason to believe that the defendant's competence may not be as practically important to achieving a fair trial as the Court implicitly assumed.[6] Nevertheless, the constitutional prohibition against trying incompetent defendants is now clear and settled. As Justice Blackmun wrote, "It is axiomatic by now that criminal prosecution of an incompetent defendant offends the Due Process Clause of the Fourteenth Amendment".[7]

In *Godinez,* the Court considered whether the standard for competence to plead guilty or to waive the right to counsel should differ from the standard for competence to stand trial. Pleading guilty waives all of a defendant's criminal justice rights, including the right to be tried and the right to remain silent. Although the Supreme Court has held that criminal defendants have a

[5] *Drope v Missouri* 420 US 162, 180 (1974).

[6] See, e.g., Robert A. Burt and Norval Morris, 'A Proposal for the Abolition of the Incompetency Plea' (1972) 40 Chicago Law Review 66; see also Bruce J. Winick, 'Incompetence to Stand Trial: An Assessment of Costs and Benefits, and a Proposal for Reform' (1987) 39 Rutgers Law Review 243.

[7] *Godinez v Moran* 509 US 389 (1993).

constitutional right to waive counsel and to represent themselves,[8] waiver of the right to counsel is weighty because counsel usually plays a crucial role in mounting an effective criminal defense. Therefore, the waiver must be knowing and intelligent. The Ninth Circuit Court of Appeals had held that waiving these rights required a higher level of mental functioning than that needed to stand trial and it imposed a standard of "reasoned choice" among the available alternatives, rather than the *Dusky* rational understanding standard.[9]

In a controversial decision, the Supreme Court reversed, holding that the same standard, rational understanding, should apply, and questioning whether the reasoned choice test was really a higher standard. There were substantial arguments suggesting that a different, higher standard should be required for competence to plead guilty and to waive counsel,[10] many of which the dissent addressed. Although different "skills" may in theory be necessary successfully to accomplish different tasks, such as assisting counsel and deciding whether to plead guilty, it is not clear that the allegedly higher standard that the Court rejected, "reasoned choice," would make much difference in practice. Rational understanding and reasoned choice are both vague formulations that provide little guidance. Whichever words are used to express the standard, the test should be a functional and context-dependent rationality standard, focusing on what skills are demanded in a particular context. Waiver of distinct constitutional rights implicates distinct rational understandings of each right waived. Thus, a defendant who appears to have general rational understanding may appear on close examination to lack that understanding for a particular trial right. If the trial court makes a careful inquiry concerning whether a particular waiver is knowing and voluntary, the more general and specific inquiries should merge, as the *Godinez* dissent recognized. Once again, however, what is necessary is not a distinct formulation for competence to plead guilty or to waive the right to counsel, but a context-dependent evaluation by the trial court of the defendant's rational capacities necessary in each context.

Finally, if a different or higher standard had been imposed, it is by no means clear that trial courts would have behaved much differently and appellate courts would seldom overturn a trial court's substantive determination that a defendant was or was not competent. In any case, then, for constitutional purposes, once again the issue is settled. Rational understanding and the ability to assist counsel are constitutionally sufficient standards for competence to stand trial, to plead guilty, and to waive one's

[8] *Faretta v California* 422 US 806 (1975).
[9] *Moran v Godinez* 972 F2d 263, 266 (9th Cir 1992).
[10] Richard J. Bonnie, 'The Competence of Criminal Defendants: A Theoretical Reformulation' (1992) 10 Behavioral Sciences and the Law 291.

rights. Congress or the states are of course entitled to impose higher standards for any aspect of competence in criminal pre-trial and trial proceedings, but the Constitution requires no more.

Should a criminal defendant who meets the *Godinez* standard for waiving the right to counsel, which is essentially the competence to stand trial standard, be permitted to proceed pro se if he suffers from serious mental disorder? The constitutional right to proceed *pro se* announced by the Supreme Court in *Faretta v. California*[11] does not depend on the defendant's ability to function as an able defense counsel. As long as the defendant understands the consequences of representing himself, he is entitled to do so. Consequently, one would have thought that as long as a defendant with severe mental disorder understood what he was doing, he would be entitled to represent himself.

Nevertheless, in *Indiana v. Edwards*,[12] the Supreme Court held otherwise, in my view unpersuasively distinguishing *Godinez* on the grounds that the issue of self-representation was not raised in the previous case and that *Godinez* involved permitting a defendant to represent himself whereas the instant case involved a state trying to prevent the defendant from doing so. Writing for the majority, Justice Breyer cautioned against trying to apply a unitary competence standard to address two very different questions: whether a represented defendant is capable of going to trial and "whether a defendant who goes to trial must be permitted to represent himself."[13] Instead, Justice Breyer tried to apply a more nuanced understanding of competency that properly considered context. He recognized that a defendant with mental disorder might be able to assist counsel but might nonetheless be too disabled to perform basic trial tasks at even a minimal level. He therefore worried that an apparently unfair trial could result. Discretion was left in the hands of trial judges to decide if a defendant is competent to represent himself even if he is competent to stand trial.

The United States Supreme Court has never addressed the constitutional standard, if any, for competence to be sentenced. This issue does not arise with great frequency because any offender about to be sentenced was competent to plead guilty or to stand trial. Nonetheless, an offender's mental condition may have deteriorated between plea or trial and sentencing or there may be a specific problem about sentencing that is not inconsistent with plea or trial competence. Criteria vary, but the essential question is whether the defendant is capable of understanding what is happening to him and why, and is able to speak for himself and to assist counsel. Lower courts have essentially employed the test for competence to be executed adopted by the

[11] *Faretta v California* 422 US 806 (1975).
[12] *Indiana v Edwards* 554 US 164 (2008).
[13] *Indiana v Edwards* 554 US 164, 175 (2008).

Supreme Court in *Ford v. Wainwright*,[14] which requires that the prisoner is able to understand what sentence is being imposed and why. Some lower courts and commentators have also imposed or suggested further requirements.[15] I believe it is fair to say that the necessity of sentencing competence is assumed for some of the same reasons that support the bar on trying an incompetent defendant. It is inconsistent with both the offender's dignity and autonomy and the dignity of the law to impose a punishment on an offender who does not understand what is happening. Perhaps more important, an incompetent offender cannot adequately participate in the sentencing process, which may make it more difficult for the defense to argue for mitigation, thus reducing the fairness of the sentencing process.

Involuntary Psychotropic Medication

In *Washington v. Harper*,[16] the Supreme Court considered whether the state may involuntarily treat a prison inmate with psychotropic medication. The Court held that although Harper had a substantive liberty right under the Due Process Clause to be free of unwanted medication, the state also had a legitimate interest in reducing the danger a mentally disordered, violent inmate poses. The Due Process Clause therefore permits involuntary treatment with antipsychotic medication if the inmate is a danger to himself or others and the treatment is medically justified in the inmate's interest. In brief, the state's interest sometimes outweighed the prisoner's liberty interest and antipsychotic medication was found to be a rational means to effectuate the State interest. Moreover, the Court did not require a prior finding of incompetence and judicial approval of the treatment using a substituted judgment standard. Finally, the Court found that potential alternatives to antipsychotic medication, such as seclusion or restraints, had not been shown to protect the inmate's liberty interest in freedom from medication at minimal cost to penological interests.

The most important Supreme Court decision prior to *Sell v. United States*[17] bearing on the state's right involuntarily to medicate a criminal defendant who is incompetent to stand trial is *Riggins v. Nevada*.[18] In *Riggins,* the Supreme Court considered whether the forced administration of antipsychotic medication to a defendant during trial violated rights guaranteed by the Sixth and Fourteenth Amendments. The Court re-affirmed the *Harper* reasoning and holding and wrote that the Fourteenth

[14] *Ford v Wainwright* 477 US 399 (1986).
[15] John Parry and Eric Y. Drogin, *Criminal Mental Health and Disability Law, Evidence and Testimony* (American Bar Association 2009) 103-104.
[16] *Washington v Harper* 494 US 211 (1990).
[17] *Sell v United States* 539 US 166 (2003).
[18] *Riggins v Nevada* 504 US 127 (1992).

Amendment provides "at least as much protection" to criminal defendants as to inmates.

Writing for the majority, Justice O'Connor found that there was a substantial probability that Riggins' trial for murder may have been prejudiced by the heavy doses of medication he was forced to take during trial. Although the treatment was medically indicated, Nevada had provided no evidence that involuntary medication was "necessary to accomplish an essential state policy" that would justify the potential prejudice to Riggins. As examples of such prejudice, the Court noted the possibility of untoward effects on Riggins' own testimony, on his interaction with counsel, and on his ability to comprehend the trial proceedings. The majority thus explicitly recognized the possibility that antipsychotic medication might prejudice a criminal defendant's rights at trial. It also noted that, "... the State *might* have been able to justify medically appropriate, involuntary treatment with the drug by establishing that it could not obtain an adjudication of... guilt or innocence by using less intrusive means"[19] [emphasis added] and that "trial prejudice can sometimes be justified by an essential state interest".[20] Thus, the majority strongly implied that adjudication of guilt or innocence might be an essential State interest that would justify involuntary medication in some cases, even if prejudice might result. The Court specifically declined to decide "whether a competent criminal defendant may refuse antipsychotic medication if cessation of medication would render him incompetent at trial"[21] because the issue did not arise in this case. Finally, the Court did not adopt any standard of review for deciding such questions. In sum, the majority left open the standard of review to be applied and whether adjudication of guilt or innocence was such an essential state interest that it would outweigh a competent defendant's liberty interest in refusing medication and his interest in avoiding prejudice at trial.

In his concurrence in the judgment, Justice Kennedy wrote that "... the medical and pharmacological data ... indicate that involuntary medication with antipsychotic drugs poses a serious threat to a defendant's right to a fair trial.[22] He expressed the opinion that the state would therefore have to make an "extraordinary showing"[23] before it could involuntarily medicate a defendant for the purpose of restoring competence and he expressly doubted that this showing could be made in most cases considering the properties of the drugs then available. Justice Kennedy likened forcible medication that changed a defendant's behavior to the prosecution's manipulation of material

[19] *Riggins v Nevada* 504 US 127, 135 (1992) [emphasis added].
[20] *Riggins v Nevada* 504 US 127, 138 (1992).
[21] *Riggins v Nevada* 504 US 127, 136 (1992).
[22] *Riggins v Nevada* 504 US 127, 138 (1992).
[23] *Riggins v Nevada* 504 US 127, 139 (1992).

evidence. He wrote that the state would need to show that there is "no significant risk that the medication would impair or alter in any material way the defendant's capacity or willingness to react to the testimony at trial or to assist his counsel."[24]

Justice Kennedy also worried that altering the defendant's demeanor might have an outcome-influencing, prejudicial effect on the defendant's constitutional rights at all stages of the proceedings, especially the right to testify in his own defense, and that side effects might hamper the attorney–client relation, " ... preventing effective communication and rendering the defendant less able or willing to take part in his defense."[25] Justice Kennedy closed his concurrence, however, by noting that psychopharmacological treatment is evolving and by recognizing that future treatments might not cause the behavioral alterations that concerned him.

Procedural Issues

The state must adopt valid procedures to determine when involuntary medication is appropriate and necessary to restore the defendant's competence and, in appropriate cases, whether medication will unduly prejudice the defendant. It also seems clear that appellate courts have jurisdiction to review non-final, trial court authorizations of involuntary medication. The most important questions are whether there must be a judicial hearing before forcibly medicating the incompetent defendant, and, if so, what burden of persuasion the state should meet. As a matter of constitutional law, deciding what procedure is due usually involves consideration of four factors: the individual and state interests, the value of the proposed procedures, and the risk of erroneous deprivation of rights the current procedures may pose.[26] Given the importance of the individual right to liberty that will be abridged, it seems clear that some form of hearing is required and that the exercise of reasonable professional judgment, although important on the issues of the medical appropriateness and necessity of medication, will not be sufficient (compare *Vitek v. Jones*, with *Youngberg v. Romeo*).[27]

In the contexts of transfer from prison to a mental hospital (*Vitek*),[28] the commitment of minors *(Parham v. J.R.*),[29] the involuntary treatment of mentally disordered and dangerous prisoners *(Harper),*[30] and the right of civilly committed patients to refuse treatment,[31] administrative hearings have

[24] *Riggins v Nevada* 504 US 127, 141 (1992).
[25] *Riggins v Nevada* 504 US 127, 144 (1992).
[26] See *Matthews v Eldridge* 424 US 319 (1976).
[27] Cf. *Vitek v Jones* 445 US 480 (1980) with *Youngberg v Romeo* 457 US 307 (1982).
[28] *Vitek v Jones* 445 US 480 (1980).
[29] *Parham v JR* 442 US 584 (1979).
[30] *Washington v Harper* 494 US 211 (1990).
[31] See, e.g., *Rennie v Klein* 462 F Supp 1131 (D NJ 1973).

been held sufficient. Although an advisor is often required, there is generally no right to be represented by counsel or by a truly independent advisor.[32] The usual rationale for these holdings is that the decision being made is essentially medical and that requiring a full judicial hearing would be unnecessary for accurate determination and inefficient.

The context of involuntary medication to restore competence is arguably distinguishable, however. Although the precedents in the other contexts suggest that the determination has substantial medical aspects, deciding whether the governmental interest is sufficient to override the defendant's autonomy and bodily integrity and thus to medicate to restore competence is a core legal question. What is at issue is not simply a question of medical appropriateness and institutional management (and even these are ultimately legal questions). For examples, as *Riggins*[33] first made clear, legal rights are in question, and, deciding whether medication will unduly prejudice trial rights is a purely legal question. Thus, there will be substantial value in permitting a genuine adversary process before a neutral judge, with defendant represented by counsel.

There is little authority on the government's burden of persuasion concerning involuntary medication. Although the defendant's interest in avoiding an unfair trial is strong, it is constitutional for the state to place the burden of persuasion to prove incompetence to stand trial on the defendant *(Medina v. California*;[34] but compare *Cooper v. Oklahoma*,[35] holding unconstitutional the requirement that the defendant must prove incompetence by the intermediate, clear and convincing evidence, standard). This might suggest that the preponderance standard would be sufficient to determine whether the defendant might be involuntarily medicated. On the other hand, involuntary medication involves both the risk of an unfair trial and a basic intrusion on autonomy and liberty. The individual's interest in being free of unwanted medication is substantial, as is the risk of error and harm. Although not as serious as a criminal conviction, involuntary medication is a serious abridgement of liberty and the individual and the state should seemingly not have to share the risk of error equally. Thus, the intermediate, clear and convincing, standard has much justification in this context.

A final procedural issue is whether trial courts should appoint a guardian *ad*

[32] The United States Supreme Court will soon decide whether a defendant in a capital sentencing proceeding is entitled to the provision of an independent mental health professional to assist him. *McWilliams v. Dunn*, No. 16-5294 (Jan. 13, 2017). I assume that the Court would find the issues of guilt and punishment distinguishable from the question of competence, but, as a normative matter, the issue of competence is sufficiently important to warrant the provision of an independent mental health professional to assist him.

[33] *Riggins v Nevada* 504 US 127 (1992).

[34] *Medina v California* 505 US 437 (1992).

[35] *Cooper v Oklahoma* 517 US 348 (1996).

litem to represent a defendant's medical interests. If the guardian consented, the state could medicate. If the guardian objected, the necessity for medication would still have to be assessed by the trial court. Thus, it is unclear what role the guardian would play. Counsel is presumably capable of developing the medical evidence that might show that medication is not medically appropriate or not likely to restore the defendant's competence.

Mental Health & Treatment Issues

Whether a defendant is incompetent and whether a defendant suffers from mental disorder, which includes intellectual disability (formerly termed developmental disability and mental retardation) are distinct issues. Although criminal defendants might be incompetent to plead or to stand trial for reasons other than mental disorder,[36] such as insufficient education or experience, many incompetence standards require the presence of a mental disorder as a necessary (but not sufficient) condition. Moreover, in practice, problems with competence are usually associated with mental disorder and those found incompetent are typically treated with mental health interventions[37] or in the case of intellectual disability, with psychoeducational methods. Initially, research indicated that incompetence was especially associated with the diagnosis of schizophrenia and psychotic symptoms.[38] More recent research, although confirming the strong association between incompetence and schizophrenia and psychotic symptoms, indicates that other disorders, too, are associated with incompetence.[39] Nonetheless, people with schizophrenia and those suffering from psychotic symptoms generally are the largest group found incompetent to stand trial. This chapter will therefore address only the involuntary antipsychotic medication of incompetent defendants with psychotic symptoms who are being medicated solely for the purpose of restoring competence.

Even after antipsychotic medication became available, the Supreme Court's opinion in *Jackson v. Indiana*,[40] which prohibited indefinite involuntary civil confinement solely for the purpose of restoring competence to stand trial unless there was a reasonable chance of restoration, suggested

[36] Jodi Viljoen, Ronald Roesch, and Patricia Zapf, 'An Examination of the Relationship between Competency to Stand Trial, Competency to Waive Interrogation Rights, and Psychopathology' (2002) 26 Law and Human Behavior 481.
[37] Norman Poythress and others, *Adjudicative Competence: The MacArthur Studies* (Kluwer-Plenum 2002).
[38] Robert Nicholson and Karen Kugler, 'Competent and Incompetent Defendants: A Quantitative Review of Comparative Research' (1991) 109 Psychological Bulletin 355.
[39] Norman Poythress and others, Adjudicative Competence: The MacArthur Studies (Kluwer-Plenum 2002).
[40] *Jackson v Indiana* 406 US 715 (1972).

that large numbers of incompetent defendants could not be restored to competence. Nonetheless, for the last four decades, antipsychotic medication has provided the most efficient means to restore a psychotic defendant's competence, although not the only means.

Psychotropic medication is not a panacea, however. A substantial number of patients do not respond, even to the most effective agents. All the drugs have side effects that can be extremely serious and unpleasant, and the drugs do not provide life skills that the person did not formerly possess. Antipsychotic treatment has changed considerably since *Riggins* was decided. The newer, so-called atypical antipsychotic medications are now widely in use, and can be effective even for those patients refractory to the traditional drugs. Most informed professionals believe that they are the first-line treatment of choice for people with schizophrenia. It now appears, however, that they are generally not more effective than the first generation of antipsychotic medications and the side-effect profile is less benign than originally thought.[41] About 40% of voluntary patients taking either generation of antipsychotic drugs discontinue use, primarily because of side effects. Antipsychotic medication for the purpose of restoring competence will be administered for a relatively brief period of time, however, thus reducing the risk of the deleterious consequences of long-term treatment that some antipsychotic medications present.

If a defendant who is a candidate for antipsychotic medication refuses to take it, administration requires either particularly intrusive, forcible oral administration or a forcible injection of agents that can be administered this way. The risks of side effects will never disappear. In appropriate pre-trial cases, such as if the defendant is not dangerous and poses no flight risk, there is no need for inpatient commitment. Medication can be provided on an outpatient basis. If the defendant does not comply with appointments, hospitalization can then be ordered. Even if the person responds well to psychotropic medication and regains reasonable cognitive control, some educational interventions may also be necessary to prepare the defendant for a criminal trial. These, too, can be provided on an outpatient basis in appropriate cases.

Despite the difficulties, medication will be the first treatment of choice for most defendants who are incompetent because they are out of touch with reality. Prescription of psychotropic medication is usually empirically-based because there are few established links between a specific diagnostic

[41] Jeffrey A. Lieberman and others, 'Effectiveness of Antipsychotic Drugs in Patients with Chronic Schizophrenia' (2005) 353 New England Journal of Medicine 1209; Peter B. Jones, Thomas R.E. Barnes, and Linda Davies, 'Randomized Controlled Trial of the Effect on Quality of Life of Second- vs First-Generation Antipsychotic Drugs in Schizophrenia' (2006) 63 Archives of General Psychiatry 1079.

assessment and a specific drug. The therapist typically starts with one from among a class of drugs that has the highest benefit–cost profile. After a trial of a few months, if the patient does not respond, a different drug is tried, and so on. If the patient who is incompetent as a result of psychosis has not responded to any drug over the course of six months, then the therapist can order clozapine. Clozapine is effective with a high percentage of non-responders but has extremely dangerous, potentially fatal side effects that require careful monitoring. If the patient still fails to respond, then it is reasonably safe to conclude that none of the available drug therapies is likely to restore the person's contact with reality.[42] In virtually all cases, a determination can be made within six to nine months that the defendant is or is not treatable. Most defendants are restored to competence within six months.[43] Nonetheless, the potential for lengthy commitment remains and can be abused, but there is no need for longer commitment to restore any competence. A conclusion of irreversibility can be reached and further commitment for restoration is unjustified.

Whether antipsychotic medication is medically appropriate and *necessary* to restore competence are essentially medical and psychological questions that mental health professionals can best judge. Indeed, the Supreme Court has recognized that such questions are primarily medical or psychological. As long as professional judgment is adequately exercised, courts will and should be unwilling to override professional judgment on this issue. The state's interest, balanced against the defendant's substantial liberty interest, would not require certainty that forcible antipsychotic medication would restore competence. It would be sufficient if a standard of reasonable medical certainty were met. Of course, the ultimate question of whether the defendant must be forcibly medicated is nonetheless legal.

On the other hand, professionals and courts will need to be sensitive to the possibility of using less intrusive means than medication to restore competence. As noted, the risk/benefit ratio of antipsychotic agents is acceptable for transient treatment, but they must be administered highly intrusively to defendants who refuse to consent to treatment. In contrast, psychosocial or educational methods may enable the restoration of competence without medication or with less medication than would otherwise be required[44] and such methods are almost

[42] Beng-Choon Ho and others, 'Schizophrenia and other Psychotic Disorders' in Robert E. Hales and Stuart C. Yudofksy (eds), *Textbook of Clinical Psychiatry* (4th edn, American Psychiatric Publishing Inc. 2003); Lauren B. Marangell, 'Psychopharmacology and Electroconvulsive Therapy' in Robert E. Hales and Stuart C. Yudofksy (eds), Textbook of Clinical Psychiatry (4th edn, American Psychiatric Publishing Inc. 2003).

[43] Norman Poythress and others, Adjudicative Competence: The MacArthur Studies (Kluwer-Plenum 2002) 51.

[44] Kirk Heilbrun, Michael Radelet, and Joel Dvoskin, 'The Debate on Treating Individuals

always less intrusive than forcible medication.[45] If such methods are potentially useful, they should be tried first because medication must be necessary to justify forcible administration. Courts will evaluate whether medication is necessary, but it is doubtful that they will override professional judgment that is adequately exercised. *Sell* has once again adopted this position in the context of trial competence, but it should be applied broadly.

Before turning to the doctrines and arguments concerning involuntary competence, let us consider whether a defendant who is incompetent in some part of the criminal process may nonetheless be competent to make a treatment decision, including the refusal of psychotropic medication. As we have seen, these agents can have serious side effects and there can be good reasons to refuse unrelated to a tactical decision concerning the criminal process. Objections based on religious belief are a classic example. In theory, it is possible that a defendant with mental disorder might be incompetent to stand trial but competent to refuse medication. The modern view of competence generally is that it can be relatively domain-specific, with diminished competence in some areas of functioning and not in others. On the other hand, Robert Schopp has argued convincingly that an incompetent defendant will also be incompetent to refuse treatment in virtually all cases.[46] I shall argue that in almost all contexts, the government should have the right to treat incompetent defendants whether or not they are competent to refuse treatment.

3. Involuntary Competence

This section begins with consideration of the general issues underlying whether it is permissible to medicate a defendant solely for the purpose of restoring competence. Then it turns to the discrete doctrinal contexts in which the issue arises.

Individual Interests

Harper and *Riggins* confirm what was already clear: Involuntary antipsychotic medication administered for the purpose of restoring competence implicates important individual and state interests, both of which must be considered to determine whether this practice is constitutionally acceptable. In *Harper,* the Court referred to the citizen's interest in avoiding unwanted administration of antipsychotic medication as a "significant

Incompetent for Execution' (1992) 149 American Journal of Psychiatry 596; Alex Siegel and Amiram Elwork, 'Treating Incompetence to Stand Trial' (1990) 14 Law and Human Behavior 57.

[45] Bruce J. Winick, 'Incompetence to Stand Trial: An Assessment of Costs and Benefits, and a Proposal for Reform' (1987) 39 Rutgers Law Review 243.

[46] Robert F. Schopp, 'Involuntary Treatment and Competence to Proceed in the Criminal Process: Capital and Noncapital Cases' (2006) 24 Behavioral Sciences and the Law 495.

liberty interest." Whether the Court was signaling that this interest is fundamental, thus necessitating strict scrutiny of its abridgment in some contexts, is unclear, but it certainly means that this is an important interest. *Harper* nonetheless applied only rational basis review in upholding involuntary medication. As many courts have pointed out, however, *Harper* is distinguishable from cases involving involuntary medication to restore competence because *Harper* concerned prison administration, a context in which deference is granted to the needs of prison administration, rather than crucial, trial-related rights.

Even if antipsychotic treatment is medically appropriate and the benefit/risk ratio is quite favorable, the individual's interest in refusing unwanted treatment is weighty because it includes the rights to dignity, bodily integrity and autonomy. In our political and legal system, no one has the right to invade another's body or to make medical decisions for another without the agent's consent if the agent is competent. People can refuse even the most sensible medical treatments for any reason they wish, including for no reason at all. In this instance, there may be many good reasons for refusing indicated antipsychotic medication, including the fear of unpleasant and sometimes disabling and even fatal side effects. In our political, moral and legal culture, it is widely believed that respect for the agent's autonomy is a deontological good. Thus, even apparently irrational decisions will be respected. It is also believed that in general agents are the best judges of their own interests. Medicating solely to restore competence is distinguishable from cases in which treatment is sought for the patient's own good or for the safety of others. The state is medicating so that it may proceed with the criminal justice process. There is thus an undoubted invasion of the defendant’s dignity, bodily integrity and autonomy. The issue is whether the state’s interests justify such an invasion.

Some believe and many courts have held that involuntary psychotropic medication also infringes upon First Amendment rights to freedom of thought and expression.[47] Antipsychotic medication does affect cognition and thus thought and expression. Further, if one denies the disease concept of mental disorder and the status of psychotic mentation and perception as symptoms, a once popular but now minority view at best, then the First Amendment argument gains strength. Moreover, at the margins, distinguishing psychotic thought from idiosyncratic or unusual thought may sometimes be difficult. In addition, some people with psychosis may rationally prefer to remain psychotic because the psychotic state seems more desirable than more realistic recognition of their life situation.[48]

[47] Bruce J. Winick, ‘Incompetence to Stand Trial: An Assessment of Costs and Benefits, and a Proposal for Reform’ (1987) 39 Rutgers Law Review 243.
[48] Theodore Van Putten, Evelyn Crumpton, and Coralee Yale, ‘Drug Refusal-Schizophrenia

The First Amendment rationale for objecting to involuntary psychotropic medication has been intensely criticized despite its initial plausibility.[49] Reducing usually ego-alien psychotic symptoms of undoubted thought disorder that cause significant distress or dysfunction would appear to increase freedom of thought rather than to decrease it. Rather than producing "synthetic sanity," in most cases the medication returns the sufferer to a baseline condition of more normal functioning, much as other medicines do for physical diseases. Most mental health professionals understand the difference between disorder and mere difference, and manifestly psychotic thinking is seldom hard to recognize. In most cases, the "freedom" to be psychotic does not seem to be a freedom worth having or freedom at all. In the present context, defendants are refusing medication to remain incompetent, not to achieve the subjective benefits of remaining psychotic (or to avoid aversive side effects). Finally, in some cases, such as incompetence to stand trial, the defendant can refuse medication after competence is restored and the process, e.g., plea, trial, sentencing, has concluded (unless the state has another sufficient interest to medicate forcibly). In sum, the First Amendment claim seems weak in this context.

Criminal defendants (and society) have an undeniable interest in receiving fair processes, including the avoidance of prejudice at trial. The primary rationale supporting the prohibition against trying incompetent defendants is that incompetence prevents them from receiving a fair trial. It would seem be inconsistent, however, to employ methods to permit a trial to proceed that would themselves unduly compromise fairness. The question, then, is whether involuntary antipsychotic medication would so prejudice the defendant's right to a fair trial that Due Process would be violated, even if the state has an essential interest.

In the United States the vast majority of criminal defendants, especially in federal cases, do not go to trial, but plead guilty instead. Thus, although most discussion of prejudice has focused on trial prejudice, the issue will arise in relatively few cases. Moreover, we may assume that antipsychotic medication that restores competence to plead guilty or to waive rights will virtually never prejudice the hearings that consider these issues. At plea and waiver hearings, judges are being asked whether or not to accept a plea or waiver and not to adjudicate guilt. This decision is unlikely to be prejudiced by the types of problem that will occur at trial itself.

As *Riggins* indicated, antipsychotic medication could affect many trial rights by interfering with the defendant's memory, ability to consult with

and the Wish to be Crazy'(1976) 33 Archives of General Psychiatry 1443.

[49] E.g., Thomas Gutheil and Paul Appelbaum, ' 'Mind Control,''Synthetic Sanity,' 'Artificial Competence,' and Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication' (1983) 12 Hoffstra Law Review 77.

counsel, and the ability to testify. Altering demeanor might also interfere with other trial rights. First, it might undermine the persuasiveness of an insanity defense by making the defendant appear "normal." Some empirical research demonstrates that juries that believe the defendant is manifesting psychotic symptoms at trial are more likely to acquit by reason of insanity than jurors who believe the defendant is free of symptoms at trial.[50] Second, altering demeanor might also generally prejudice the factfinder by making the defendant appear lacking in remorse or concern, an issue that also plays a role at sentencing.

These are serious concerns, as Justice Kennedy indicated in *Riggins*. Anti-psychotic medication at proper dosage levels typically does not sedate the defendant or otherwise impair a person's abilities. Rather, if effective, it restores cognitive functioning and should enhance the defendant's performance. Courts must clearly assess the potential for prejudice and should apply any reasonable remedies, including instructions, that might reduce such prejudice. And many of these concerns can be alleviated by effective advocacy. Lower courts have assumed that undue prejudice can be avoided in most cases.

It seems clear that a defendant should *not* have a constitutionally protected right to refuse psychotropic medication solely for the purpose of avoiding criminal trial or otherwise to delay or impede the criminal process. Some defendants would understandably prefer to delay or to avoid trial for tactical purposes or for other reasons concerning personal comfort, and such motives surely cause some defendants to raise the issue of incompetence. Nonetheless, a defendant has no legitimate right to "game" the system by refusing a treatment that might restore him or her to competence, no matter who raises the issue of competence. Moreover, a defendant who could be restored to competence may in some cases, such as incompetence to stand trial, remain committed under *Jackson*, thus forcing the state to bear the expense of costly confinement. The state should not have to absorb such a cost unless there is strong justification for it. Now, there are many justifiable reasons a defendant might want to refuse anti-psychotic medication, such as fear of side effects, but refusing medically appropriate treatment solely for the purpose of delaying or avoiding a criminal trial does not seem justifiable.

Standing alone, the psychotic individual's interest in bodily integrity and autonomy are strong, but the interest in freedom of thought seems less powerful. The defendant also has a substantial interest in avoiding trial prejudice, but little legally cognizable interest in refusing medically

[50] Karen E.Whittemore and James R.P. Ogloff, 'Factors that Influence Jury Decision Making: Disposition Instructions and Mental State at the Time of the Trial' (1995) 19 Law and Human Behavior 283.

appropriate treatment solely for the purpose of preventing trial or the continuation of the criminal process.

State Interests

The state interest in adjudicating guilt and innocence and achieving finality in the criminal process is concededly "essential" or important. In *Riggins,* for example, Justice O'Connor quotes Justice Brennan's concurrence in *Allen v. Illinois*:[51] "Constitutional power to bring an accused to trial is fundamental to scheme of 'ordered liberty' and prerequisite to social justice and peace."[52] *U.S. v. Weston*,[53] which presents a thorough and representative discussion of the state interests, concluded that it is "essential." The opinion pointed to the many statements by the Supreme Court that the government has a compelling interest in apprehending, convicting and punishing criminals. The state interest is not only incapacitation, but also "demonstrating that transgressions of society's prohibitions will be met with an appropriate response by punishing offenders."[54] The opinion rejects civil commitment as a viable alternative because

> The civil commitment argument assumes that the government's essential penological interests lie only in incapacitating dangerous offenders. It ignores the retributive, deterrent, communicative, and investigative functions of the criminal justice system, which serve to insure that offenders receive their just deserts, to make clear that offenses entail consequences, and to discover what happened through the public mechanism of trial. Civil commitment addresses none of these interests.[55]

Acquittal of the innocent is also achieved only in the criminal justice system. *Weston* concluded that trying a defendant is the only constitutionally acceptable means for the state to further the essential interest in adjudicating guilt and innocence.

To assess the importance of this interest, consider an analogous problem.[56] Suppose that obtaining the testimony of the sole material witness to a crime was the only effective means by which a state could effectively try a defendant. Not only does the state have the right to compel such testimony—by providing immunity, if necessary, and by the threat of contempt—but the state also has

[51] *Allen v Illinois* 397 US 337 (1970).
[52] *Riggins v Nevada* 504 US 127, 136 (1992) quoting *Allen v Illinois* 397 US 337, 347 (1970).
[53] *US v Weston* 255 F 3d 873 (DC Cir 2001).
[54] *US v Weston* 255 F 3d 873, 880 (DC Cir 2001).
[55] *US v Weston* 255 F 3d 873, 881 (DC Cir 2001).

[56] This analogy was suggested to me by Professor Adam Candeub.

the right to incarcerate a material witness who will flee the jurisdiction. The state interest in trying a criminal defendant must be weighty if it justifies such substantial intrusions on the liberty of a person other than the defendant and who may be entirely innocent. Indeed, the state interest might even be sufficient to medicate the material witness involuntarily if this were the only means to restore competence to testify.

Assuming that the state interest in adjudicating guilt or innocence may be essential, must it always be essential? For example, *U.S. v. Brandon* [57] held that the state interest would not be essential in less serious crimes. *Weston* took no position on that issue because defendant Weston was charged with multiple murders and the government's interest in prevention of danger is unparalleled in such cases of obvious threat. *Weston* implied, however, that the seriousness of the crime might be a criterion for deciding whether the state interest was substantial. *U.S. v. Gomes*[58] rejected a bright line rule in favor of case-specific weighing, and pointed to the breadth of the harm a type of crime created and to the dangerousness of the defendant as the most important factors. As we shall see in the next sub-section, *Sell* at least theoretically settled this question for the purpose of restoring competence to stand trial.

Incapacitation is less weighty for less serious crimes, but some of the other interests, such as retribution, adjudication, and communication, would be equally well served by trying less serious cases. Moreover, it is not clear what should count as a serious crime. In *United States v. Jones*,[59] for example, the Supreme Court considered whether the Constitution permitted indefinite confinement of a person who was committed following a verdict of not guilty by reason of insanity on a charge of shoplifting a jacket. The Court was unwilling to limit indefinite commitment for dangerousness to those who had committed crimes of "violence" and was willing to characterize non-violent theft as sufficiently dangerous constitutionally to justify potentially life-long confinement to protect the public. It is reasonable to conclude that the state's interest in trying all defendants is as strong as the state's interest in protecting the public from mentally disordered, non-violent people who shoplift. Moreover, potentially indefinite confinement is a much greater infringement of liberty than transient antipsychotic treatment for the purpose of restoring competence. Nonetheless, if one is balancing the interests, state interests are diminished as the seriousness of the crime or the dangerousness of the criminal decreases.

The most general, implicit objection to the state's strong interest in finality is that involuntary medication to restore competence violates the basic

[57] *US v Brandon* 158 F 3d 947 (6th Cir 1998).
[58] *US v Gomes* 289 F 3d 71 (2d Cir 2002).
[59] *US v Jones* 463 US 354 (1983).

integrity of the American system of accusatorial, adversarial criminal justice because one party, the state, is permitted to intervene involuntarily in the mental processes of its adversary, the defendant. Although plausible, this objection seems unpersuasive. The essential state interest in adjudicating guilt or innocence and pursuing the consequences of guilt to their conclusion and the interest of all parties in fair process are undeniable. The defendant has no right to avoid adjudication if there is probable cause to believe a crime has been committed or to avoid the consequences of guilt if the defendant pleads guilty or is convicted. Thus, the only question is whether involuntary medication of the defendant undermines the fairness of trial or the defendant's ability to help produce the strongest possible defense. If it does not, then the state will meet a fully adversarial defense. Indeed, to the extent that the defendant's mental capacities are improved by the medication, it is likely to improve the quality of the defense. Involuntary medication does not compromise the independence of the defense. As long as the medication is medically appropriate and is being used solely for the legitimate purpose of restoring competence, involuntary medication by the state seems neither unseemly on its face nor a violation of the values of the adversarial system.

Competence to Stand Trial

In *Sell v. United States*,[60] the Supreme Court addressed whether and under what conditions the state could forcibly medicate an incompetent defendant for the purpose of restoring the defendant's competence to stand trial. The Court agreed, as it had previously in *Harper*, that citizens have a strong liberty interest in being free of unwanted medical interventions. The Court nonetheless held that an incompetent defendant could be involuntarily medicated if four conditions were met: the treatment was medically appropriate, the governmental interest was strong because the charges were serious, the treatment would not cause trial prejudice, and less restrictive means of restoring competence were not effective. The Court did express a preference for treating the defendant under an independent and less fraught rationale, however, such as the *Harper* rationale based on the defendant's dangerousness. Not all incompetent defendants satisfy such an independent rationale for involuntary treatment and trial courts have to apply the *Sell* criteria. Although *Sell* appears to put serious restrictions on the state's ability to forcibly medicate, in practice the limitations are not substantial, especially in federal cases.[61]

[60] *Sell v United States* 539 US 166 (2003).
[61] Christopher Slobogin, 'Sell's Conundrums: The Right of Incompetent Defendants to Refuse Anti-Psychotic Medication' (2012) 89 Washington University Law Review 1523.

Three of *Sell*'s conditions are appropriate, although the issue of trial prejudice is best addressed at trial, as I suggest below. I would go further, however, and argue that the government's interest in trying an accused is sufficiently strong in the case of any felony or violent misdemeanor to justify forcible medication of an incompetent defendant for the purpose of restoring competence. All felonies and violent misdemeanors are serious crimes because both have the potential to result in stigma and serious prison time, the interests *In re Winship*[62] adduced when holding that the constitution required the state to bear the burden of persuasion beyond a reasonable doubt on all the elements of the crime. A criminal prosecution is an extremely serious matter. Neither the case nor the prosecution and defense should remain in limbo while an incompetent defendant languishes in a hospital untreated. The incompetence standards and consequences are not meant to be used strategically by either side. What is the point of keeping an incompetent defendant in a hospital to restore competence if restoration is made impossible by treatment refusal or by refusal to treat without informed consent? The intrusion of forcible medication is not trivial, to be sure, but neither is it so extensive that it should block the progress of the case. It is not a form of thought control or any other type of unjustifiable intervention. Forcible medication simply tries to restore the person's cognitive control and ability to test reality. Moreover, hospitalization is expensive and should be terminated as soon as possible. Finally, no good alternative usually presents itself.

Professor Christopher Slobogin[63] proposed that the criteria should be simplified to permit forcible medication if the defendant is charged with a felony and if it is medically appropriate. I have already argued that violent misdemeanants should also be included and I think he gives too little weight to the possibility of trial prejudice. So few defendants go to trial that that this is not a serious practical problem, but in the relatively few cases in which it is a problem, it should be addressed, albeit at trial and not in the initial medication decision. Thus, we may not disagree on this issue. Professor Slobogin also worries reasonably that the *Harper* rule, whereby prisoners who are mentally disordered and dangerous may be medicated, can be used to undermine the integrity of *Sell*'s limiting criteria, primarily because the meaning of dangerousness is not clear. Consider again the Supreme Court's *Jones* decision in which shoplifting was considered sufficient danger to justify indefinite post-insanity acquittal commitment. In other words, the state may use *Harper* as a pretext for avoiding *Sell* to restore competence. I agree that this is a problem that needs clarification. If *Harper* is being used for that pretextual purpose, it is an

[62] *In re Winship* 397 US 358 (1970).
[63] Christopher Slobogin, 'Sell's Conundrums: The Right of Incompetent Defendants to Refuse Anti-Psychotic Medication' (2012) 89 Washington University Law Review 1523.

abuse that must be ceased. If there is no pretense, then the state has two independent justifications for forcible medication that may be used in appropriate cases. Non-pretextual use of *Harper* forcibly to medicate that restores competence as a side-benefit is not an abusive practice.

Many defendants have been and will be medicated, so we must address in detail how possible prejudice can be avoided. Appropriately dosed medication is more likely to restore the defendant's ability to appear and respond appropriately, rather than to flatten his or her affect to a degree that conveys a potentially deleterious impression of unconcern. If altered demeanor does seem to risk undue prejudice either to an insanity defense or more generally, there are reasonable remedies. Expert witnesses can explain the effects of the drugs to the jury and the judge can issue cautionary instructions. If there is a bench trial, the dangers would be further reduced. On the other hand, cautionary instructions are often ineffective and expert testimony may be less salient than the appearance of the defendant.

It would be optimum if the trial judge held a brief hearing just prior to trial to evaluate whether undue prejudice was likely to result from the competent defendant's medicated condition, but for resolving most potential prejudice issues other than the ability to communicate with counsel effectively, this determination will be difficult to make in a context other than the trial itself. Consequently, these potential problems can be best monitored at trial, when the judge will have the opportunity carefully to observe the defendant's particular response to medication. Thus, in most cases, defendants who are competent on medication should be tried and the effects of potential prejudice should be assessed by the trial judge at trial.

If prejudice seems too great at trial, the judge may have to halt the proceedings. If too much prejudice has already been created or if the defendant cannot be restored to competence by means that do not create undue prejudice within a short period of time, the judge will have to declare a mistrial. The question then is whether this mistrial is occasioned by "manifest necessity," that is, conditions under which it is not unjust to re-try the defendant and double jeopardy does not obtain. Trial judges have great discretion in these matters. On the one hand, the defendant has been medicated at the prosecution's request and the defendant may not have moved for a mistrial. On the other hand, the state interest in adjudicating guilt or innocence is substantial, and the request for forcible medication is not done to gain a tactical advantage but to advance a constitutionally important value. Thus, manifest necessity should apply and the defendant should be tried again if he can be restored to competence without creating too much prejudice. Even if it is constitutionally permissible for a state to re-try a defendant under these circumstances, a state may impose more restrictive rules if it wishes. If the defendant cannot be restored to competence without creating prejudice, the defendant should be declared

permanently incompetent.

If the defendant can prevent restoration or simply cannot be restored without prejudice, rendering him permanently incompetent, then the government must dismiss the charges, presumably with prejudice, and seek involuntary civil commitment. This is an imperfect remedy because civil commitment terms are relatively brief and not geared to people for whom there is probably cause to believe a serious crime has been committed. Perhaps, a special form of commitment is needed. For example, some jurisdictions already have special forms of lengthy commitment for certain classes of especially dangerous people who have been charged with a crime but have not been convicted, and who are non-responsible and dangerous to others.[64] This would be a clear instance of preventive detention, but without necessary treatment, such commitments are simply warehousing.

If this type of scheme were adopted, we should insist that the State prove that the defendant did commit the crime to differentiate the subject from the subject of traditional involuntary commitment. In addition, the State should prove that the defendant is mentally disordered and dangerous, and the defendant should have full due process protections and the right to periodic review.[65] For example, the types of protections applied to sexual predator commitments, including the right to full adversary counsel and proof beyond a reasonable doubt, should be provided because so much loss of liberty is at stake. Automatic review should be frequent, the review should be thorough and include a hearing, and some provision for permitting the person committed to challenge the commitment between automatic reviews should be available. If the person could be forcibly treated in involuntary civil commitment or in some form of special commitment under a different rationale, then perhaps trial competence would be restored.

Finally, consider a question that *Riggins* explicitly reserved and *Sell* did not address: Whether a defendant restored to competence may waive his right to be competent by ceasing medication, assuming that cessation is for the limited purpose of demonstrating his unmedicated mental state to the factfinder. *Weston* argued that the defendant claiming a mental state defense

[64] Cal Welf & Inst Code §§ 5008(h)(1)(B) & 5350 (West 2010), providing for "conservatorships" for people who are permanently incompetent to stand trial; conservatorships are for a year and may be renewed annually; the placement may be in a secure facility if necessary.

[65] Some dangerous people might still be uncommittable. Imagine a defendant who invalidly waives his rights as a result of mental disorder and the State needs the evidence to obtain a conviction. Between the waiver and the commitment, however, the defendant regains his mental health and is no longer committable. I assume that, as a technical matter, such a person would have to be released. I also assume that it would virtually never happen.

has no absolute right to replicate on the witness stand his mental state at the time of the crime. *Weston* used the following analogies: A defendant claiming a reduction to voluntary manslaughter from murder based on a theory of provocation and passion does not have the right to be enraged on the stand and a defendant claiming an intoxication-based doctrine does not have the right to appear in court drunk. On the other hand, most finders of fact probably have experience with rage and intoxication, but much less experience with manifest psychotic behavior. There may be particular evidentiary value in observing the defendant unmedicated. Therefore, unless the defendant's behavior would be unduly disruptive, perhaps the defendant should be permitted to waive the right to be competent on a temporary basis.[66] This may appear inconsistent with the rationale for prohibiting trying incompetent defendants, but neither accuracy nor autonomy seems substantially compromised in these limited circumstances. If this were to be allowed, the trial judge would have to make a careful inquiry into the validity of the waiver, which could be temporary, with medication continuing after the finder of fact has observed the un-medicated state. This would be time-consuming and cumbersome, however, and I suspect it would seldom arise.

Unless the Supreme Court reverses decades of incompetence jurisprudence, it is not possible to try incompetent defendants even in those cases in which they could receive a fair trial. To permit this, however, would solve many of the problems raised by *Sell* or by cases of seeming permanent incompetence, allowing final resolution of the criminal justice process. One may fairly ask how we could be sure that the trial would be fair, but I suggest that this could be resolved at pretrial hearings. Everything depends on how complicated the issues are and whether difficult strategic choices will be necessary in which the defendant would be likely to disagree with the attorney's advice. We could also adopt various prophylactic rules, such as requiring the prosecution to disclose evidence that may not pass the *Brady v. Maryland*[67] threshold of actual innocence evidence, but which arguably favors the defense. In any case, the issue will not arise frequently because most state and federal cases are resolved by plea bargains. Nonetheless, the incompetence process would be rationalized in those cases in which going to trial seems optimal and a fair trial would be possible despite incompetence. I recognize that this is a controversial suggestion and the procedural requirements to guarantee fairness would be complex, but, in principle, this is a reform that could work.

[66] See *State v Hayes* 389 A 2d 1379 (NH 1978).
[67] *Brady v Maryland* 373 US 83 (1963).

Competence to Plead Guilty and to Waive Rights

In *Godinez,* recall that the Supreme Court was asked to impose a standard of a so-called reasoned choice for cases involving competence to plead guilty and to waive the right to counsel, a test, that was different from the standard for incompetence to stand trial. The argument for doing so was that pleading is more complicated than going to trial and therefore a different and presumably higher standard was required to satisfy due process. The Court refused to adopt a different test, holding that the competence to stand trial standard was sufficient to protect the defendant's rights as long as the waiver of the right to trial and other constitutional protections was actually knowing and voluntary. In his concurrence in *Godinez*, Justice Kennedy characterized the requirement as "knowing, intelligent, and voluntary." After all, a defendant might be competent but might not actually understand what he is doing as a result of confusion, marginal competence, or the like.

Requiring deeper or more detailed rational understanding risks paternalism, but requiring less risks an unjust outcome. I have a preference for limiting paternalism as much as possible and perhaps the Court's recognition that the defendant must actually waive his rights knowingly partially remedies the vagueness of the general test. On the other hand, defining knowing or intelligent is as vulnerable to manipulation as defining competence itself. In short, evaluating any competence case is a normatively fraught and difficult enterprise. I have no easy answer, but simply a policy preference for keeping the bar relatively low to let most defendants over it. This will maximize liberty, but the danger is that it will also unduly risk the defendant's ultimate liberty by potentiating the possibility of an irrational outcome.

If the defendant is not competent to plead and to waive rights because he has failed the competence to stand trial standard or a state-imposed higher standard, the state should have a right to forcibly medicate so the defendant can competently make a choice—to plead guilty--that is open to and overwhelmingly chosen by most competent defendants. All the same reasons to achieve finality that apply to competence to stand trial apply *a fortiori* in this context. Once again, there is no need for lengthy treatment to decide if the defendant is restorable.

Competence to Proceed Pro Se

This issue seems straightforward. If the defendant is competent to stand trial, he is probably going to be competent to make a treatment decision. If he fails an *Edwards* standard and is not permitted to represent himself because he has psychological abnormalities, then he will have every incentive to try to alleviate those abnormalities so that he can represent himself. Thus, the defendant should be told that either he can permit medication and perhaps be

able to represent himself or a lawyer will be appointed to represent him. I see no need for involuntary medication in this situation. The choice he is offered respects his autonomy and dignity.

In the unlikely event that the defendant's abnormalities do render him incompetent to make a treatment decision even though he is competent to stand trial, then a dilemma arises. Presumably his decision to represent himself is competently made. The *Edwards* problem is not incompetence to make a decision; it is that the defendant's psychological abnormalities will prevent him from meeting even the very low threshold for self-representation. If he wants to go forward *pro se* despite having such disabilities, that may indicate that his decision is not rational and perhaps he is not competent to stand trial either. It is simply not clear. In this case, I would permit forcible medication both to insure trial competence and to provide the strongest possibility of the defendant becoming sufficiently capable to overcome *Edwards* concerns.

Competence to be Sentenced

It is inconsistent with both the offender's dignity and autonomy and the dignity of the law to impose a punishment on an offender who does not understand what is happening. Moreover an incompetent offender cannot adequately participate in the sentencing process, which may make it more difficult for the defense to argue for mitigation, thus reducing the fairness of the sentencing process.

Unlike the defendant incompetent to stand trial who is presumed innocent, the defendant incompetent to be sentenced has been convicted and is lawfully in custody (or is perhaps out on bail, but still under criminal justice restraint). The offender has a clear interest in being free of unwanted mind-altering medication, but both the individual's interest and the government's interest in sentencing a convicted defendant are also strong. If the offender is a danger to himself or others in custody—whether in a jail or a hospital—*Harper* permits his involuntary medication, and he may thereby also be restored to competence to be sentenced.

Suppose, however, that there is no *Harper* justification? I would permit the state to medicate the offender as long as it was medically appropriate and less restrictive alternatives, such as psychosocial therapies, were unavailing. Defendants incompetent to be sentenced are probably not competent to refuse treatment for the same reasons that defendants incompetent to stand trial are probably not competent to refuse. Retaining a psychotic, unsentenced convict in a jail is cruel, and hospitalization, which is more expensive than a prison, is an unjustified use of resources. If the defendant is on bail and is not dangerous, treatment could be accomplished in the community on an outpatient basis. There is systemic value in reaching final resolution of

questions a case presents and a rational convicted defendant also should want finality.

If the offender simply cannot be restored or there is otherwise reason to avoid involuntary medication, the court could impose a conditional sentence and retain the person in a hospital or perhaps in prison if the latter can manage the person. I assume that, as a practical matter, the sentence would be the maximum for the crime of conviction. If there had been a plea bargain and sentence was part of the agreement, then the sentence would be for the agreed term. If at any point the convict is restored to competence, either by agreeing to take medicine or by spontaneous recovery, the court can then impose a final sentence. If the defendant is never restored to sentencing competence, then he would be released at the end of the conditional sentence.

4. Conclusion

All individuals, including defendants and prisoners in the criminal justice system, have a strong substantive liberty interest in avoiding unwanted medical interventions, such as psychotropic medication. On the other hand, the state in most cases has a strong interest in adjudicating guilt or innocence and in completing the consequences of guilt, such as sentencing and punishment. I have termed this the state interest in finality. If forcible medication is used appropriately after proper procedures to restore competence, I believe the state interest should prevail.

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